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No. 88-525

In The

Supreme Court of the United States

October Term, 1988

FEDERAL COMMUNICATIONS COMMISSION AND EDWIN MEESE III, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Appellants and Cross-Appellees,

v.

SABLE COMMUNICATIONS OF CALIFORNIA INC.,

Appellee and Cross-Appellant.

On Appeal From the United States District Court for the Central District of California

MOTION OF APPELLEE AND CROSS-APPELLANT SABLE COMMUNICATIONS OF CALIFORNIA INC. TO DISMISS OR TO AFFIRM IN PART

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October 27, 1988

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QUESTION PRESENTED

The question presented by this motion is whether this appeal from a District Court decision holding unconstitutional that portion of an act of Congress (47 U.S.C. § 223(b)) imposing criminal and civil penalties upon presumptively protected "indecent" speech raises questions sufficiently substantial as to require further argument.

PARTIES

All parties are listed in the caption of this motion. Affiliates of appellee and cross-appellant Sable Communications of California Inc. are:

Carlin Communications, Inc.
Saphire of Arizona, Inc.
Joy Communications of California, Inc.
Lynx Communications of California Inc.
Sapphire of Colorado Inc.
Sapphire Communications of Florida, Inc.
Sapphire of Georgia Inc.
Sapphire of Iowa, Inc.
Sapphire of Communications of Kentucky, Inc.
Sapphire of Louisiana Inc.
Joy Communications of Maryland Inc.
Joy Communications of Michigan Inc.
Sapphire of Michigan Inc.
Sapphire of Minnesota Inc.
Sapphire of Nebraska Inc.
Sapphire of Nevada Inc.
Sapphire of Oregon Inc.
Joy Communications of Pennsylvania Inc.
Sapphire Communications of Pennsylvania Inc.
Sapphire Communications of Texas Inc.
Sapphire of Virginia Inc.
Sapphire of Washington Inc.
Sapphire of Washington D.C. Inc.

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SABLE COMMUNICATIONS OF CALIFORNIA INC.,

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On Appeal From the United States District Court for the Central District of California

MOTION OF APPELLEE AND CROSS-APPELLANT TO DISMISS OR TO AFFIRM IN PART

Pursuant to Rule 16.1, appellee and cross-appellant Sable Communications of California Inc. moves to dismiss the appeal filed on behalf of the Federal Communications Commission and the Attorney General of the United States (collectively "the Government") or, in the alternative, to affirm that portion of the District Court decision holding 47 U.S.C. § 223 (b) unconstitutional. This motion is based on the ground that the position advanced by the Government represents so substantial a departure

from settled authority, including recent decisions of this Court, as to present no issue warranting further argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech * * *."

Section 223(b) of the Communications Act of 1934, as amended effective July 1, 1988, provides:

> (b)(1) Whoever knowingly-
>
> (A) in the District of Columbia or in interstate or foreign communications, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.
>
> (2) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3)(A) In addition to the penalties under paragraphs (1) and (2), whoever, in the District of Columbia or in

interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either-

(i) by a court, pursuant to a civil action by the [Federal Communications] Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(4) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

ARGUMENT

The Government appeals from the decision of the District Court for the Central District of California (the Honorable A. Wallace Tashima) holding "overbroad and unconstitutional," and preliminarily enjoining enforcement of, that portion of 47 U.S.C. § 223(b) purporting to ban "indecent" communications.[1] The District Court declined to enjoin enforcement of the balance of the statute, which it held to be severable from the unconstitutional element.[2] The Government urges reversal on two

[1] The full text of the District Court decision appears as Appendix A to each of the parties' Jurisdictional Statements.

[2] This portion of the District Court's decision is the subject of cross-appeal No. 88-515.

grounds: that the "indecency" provision of section 223(b) falls within the ambit of this Court's reasoning in *FCC v. Pacifica Foundation*, 438 U.S. 726, *rehrng. den.* 439 U.S. 883 (1978) ("*Pacifica*") and that, in any event, the federal government's interest in preventing minors' access to adult communications justifies an extension of *Pacifica's* rationale to the medium and the communications at issue here.

Through repeated references to the allegedly "pornographic" nature of such communications and through the invocation of Congressional hearsay, the Government's Jurisdictional Statement seeks to muddy the clear distinction drawn in multiple decisions of this Court between obscene speech and protected non-obscene speech, thus glossing over the fact that if upheld *in toto* section 223(b) would, for the first time, permit criminal prosecution for "indecent" communications.[3]

1. In *Pacifica*, the Court let stand an FCC order holding a licensee's broadcast to be "indecent" under 18 U.S.C. § 1464 and imposing no sanction but incorporating its findings in the licensee's FCC file.[4]

More recently in *Bethel School District v. Fraser*, 478 U.S. 675 (1985), the Court upheld the School District's

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[3] Such prosecutions have heretofore been permitted only where the term "indecent" was held to be coextensive with "obscene" within the meaning of *Miller v. California*, 413 U.S. 15 (1973). *See, Hamling v. United States*, 418 U.S. 87, 110 (1974).

[4] The FCC was careful to point out that it did not by its actions seek to prohibit broadcasts deemed indecent, but merely to "channel" them to more acceptable times of day. 438 U.S. at 732-733.

suspension of a student for an "indecent" speech to a student assembly, noting, in particular, the limited sanction involved:

> "Two days' suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution." *Id* at 686.

The Government's attempt to bring section 223(b), with its penalties of up to $50,000 and six months' imprisonment (the former for each day of violation), within the reasoning underlying these decisions is both disingenuous and dangerous. The issue is not whether the media involved are comparable (they are not, for the reasons discussed *infra*), but whether the expressly "narrow" holding in *Pacifica* (438 U.S. at 750) provides any support for the Government's position. One need only consider the application of section 223(b)'s draconian sanctions to the "indecent" speech reproduced in Justice Brennan's concurring opinion in *Bethel, supra*, to recognize that the Government here seeks not a natural extension of *Pacifica* or *Bethel* but a drastic constriction of First Amendment protections far beyond the boundaries of any decision of this Court.

Virtually every court, including this one, which has considered the issue has refused to extend the *Pacifica* holding, even in analogous circumstances. *See, e.g., Community Television of Utah, Inc. v. Roy City*, 555 F.Supp. 1164 (D. Utah 1982); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983); *Community Television v. Wilkinson*, 611 F.Supp. 1099, 1108 (D.C. Utah 1985), *aff'd, sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985),

Carlin Communications, Inc. v. F.C.C., 837 F.2d 546 (2d Cir. 1988), petition for cert. pending ("Carlin III"). *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43 (D.C. Cir.), *cert. den.*, 434 U.S. 829 (1977).

In *Bolger, supra*, the Court struck down a federal statute which prohibited the unsolicited mailing of contraceptive advertisements. Rejecting the government's argument that the statute protected recipients of mail from offensive materials, the Court stated:

> "The First Amendment 'does not permit the government to prohit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.' " 463 U.S. at 72. [citation omitted]

The Court noted in particular that

> "The special interest of the federal government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication."
> *id.* at 74 (footnote omitted).

In *Cruz, supra*, the Court refused to extend the *Pacifica* rationale even to cable television, reasoning that "parental manageability of cable television greatly exceeds the ability to manage the broadcast media." 755 F.2d at 1420.

Most recently, in *Carlin III, supra*, the Second Circuit specifically noted that "*Pacifica* did *not* decide that the indecent broadcast 'would justify a criminal prosecution.' " 837 F.2d at 560.

Even those responsible for enforcement of section 223(b) acknowledge that its total ban on, and criminalization of, indecent speech is far beyond the bounds and

intent of *Pacifica*. *See* Government Jurisdictional Statement, page 14, ftnt. 9. The Government's dismissal of the views of the FCC General Counsel as mere "predictions of likely judicial rulings" is also inaccurate. Those views take into account not only the result in *Pacifica* but also its reasoning, affirmed in the many decisions cited *supra*, that the nature and circumstances of radio broadcasts are unique, that access to messages on that medium is often involuntary and, most importantly, that the sanctions imposed by the FCC were *de minimis*.

In attempting to use *Pacifica* as a springboard to criminal prosecution of non-obscene speech, the Government thus seeks a departure not only from the narrow holding in that case but also from its reasoning and its grounding in constitutional principles.

2. In emphasizing that Congress did not intend the term "indecent" as used in 18 U.S.C. § 1464 to be synonymous with "obscene," the Court in *Pacifica* noted that "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality" (*Id.* at 740), citing the definition found in Webster:

> "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality: . . ."
> *Ibid.*, ftnt. 14

It is undisputed that section 223(b)'s use of "indecent" (both as originally enacted and as amended) "was clearly made with [*Pacifica*] in mind" *Carlin III*, *supra* at 558. See, Government's Jurisdictional Statement, p. 10. No decision cited by the Government, nor any of which

appellee is aware, even suggests that the application of criminal sanctions would be constitutionally permissible in such a context.

"It is a basic principal of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294 (1972). Due process requires that laws provide notice to the ordinary person of what is prohibited and provide standards to law enforcement officials to prevent arbitrary and discriminatory enforcement. *Postscript Enterprises, Inc. v. Whaley*, 658 F.2d 1249, 1254 (8th Cir. 1984). Statutes designed to regulate speech, in particular, must be carefully limited to avoid infringement of First Amendment rights. As this Court noted in *Miller v. California, supra*:

> "We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression . . . statutes designed to regulate obscene materials must be carefully limited. (Citations omitted.) As a result, we now confine the permissible scope of such regulations to works which depict or describe sexual conduct. The conduct must be specifically defined by the applicable [law] as written or authoritatively construed." At 23-24.

Thus even if, as the Government would have it, the many differences between the limited spectrum and involuntary intrusiveness of radio broadcasts on the one hand and media such as cable television and the telephone on the other, recognized in *Cruz v. Ferre, supra, Home Box Office, Inc. v. FCC, supra, Carlin III, supra*, and *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 120 (2nd Cir. 1984), are disregarded, section 223(b) would still fail to meet constitutional criteria to the extent it criminalizes

speech outside the ambit of *Miller* and *Ginsberg v. New York*, 390 U.S. 629 (1968). *Pacifica* clearly offers no support for such a departure from the holdings of this Court.

The Government does not address this issue directly, referring instead to congressional determination to bar "pornographic" messages accessed by minors. This begs, or blurs, the question. To the extent Congress is entitled so to act, it has done so in enacting section 223(b)'s ban on "obscene" communications. To go beyond the *Miller* and/or *Ginsberg* obscenity standards requires, first, a reevaluation by this Court of the limits of First Amendment protection and, second, adoption of a new category of unprotected speech more clearly delineated than "indecent." Neither of these considerations is acknowledged in the Governmant's Jurisdictional Statement, and certainly neither flows from *Pacifica*, however broadly construed.

3. The Government invokes *Ginsberg v. New York*, *supra*, for the undisputed proposition that the well-being of children is a legitimate legislative objective. The Court in that case held that a state could establish an obscenity standard for materials sold to minors differing from that governing adult materials. A more stringent obscenity standard is, however, a far cry from the use of "indecent" as defined by the Court in *Pacifica* and adopted by Congress in section 223(b) as a basis for criminal prosecution. Moreover, the *Ginsberg* case did not present a situation where adult access to materials would be impeded. Hence, there was no danger that the legislation would "reduce the adult population . . . to reading only what is fit for children" (*Butler v. Michigan*, 352 U.S. 380, 383 (1947)), the result which the Government candidly

acknowledges (Jurisdictional Statement, page 23, ftnt. 15) would prevail if section 223(b) were upheld.

CONCLUSION

For the foregoing reasons, appellee respectfully submits that the question upon which this appeal arises is so insubstantial as to need no further argument, and moves the Court to dismiss this appeal or, in the alternative, to affirm the portion of the decision of the District Court for the Central District of California holding unconstitutional the "indecency" standard set forth in 47 U.S.C. 223(b).

Dated: October 27, 1988

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